APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-7736

NLRB Nos. 19-CA-11364, 19-AC-23

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SEATTLE-FIRST NATIONAL BANK,
Intervenor.

On Petition for Review of an Order of the National Labor Relations Board

Argued and Submitted September 7, 1983

[Filed Aug. 2, 1984]

OPINION

Before: WRIGHT, PREGERSON, and FERGUSON, Circuit Judges.

PREGERSON, Circuit Judge:

The National Labor Relations Board now requires that non-union employees participate in a certified union's internal decision to affiliate with another labor organization before the Board will amend the newly-affiliated union's certification as the unit's exclusive bargaining representative. The question before us is whether the new rule is rational and consistent with the National Labor Relations Act (NLRA). Because the rule fails this test, we grant the union's petition for review and reject the rule.

PROCEDURAL BACKGROUND

A. *Affiliation Decisions and the Board's New Rule*

In this case, an independent, Board-certified union of bank employees, Firstbank Independent Employees Association, voted to affiliate with the Retail Clerks Union (Retail Clerks). In accordance with the independent union's constitution, only union members voted in the affiliation election. Upon a vote favoring affiliation, the union changed its name to Financial Institution Employees of America, Local 1182, chartered by the Retail Clerk's International Union, AFL-CIO.[1] The Board determined that the affiliation did not substantially change the character of the union. *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979). The Board then amended the independent union's certification as the exclusive bargaining representative of the bank's employees to designate the newly-affiliated union as the independent's successor. *Id.* When the employer, Seattle-First National Bank, refused to bargain with the newly-affiliated union, the Board found the Bank guilty of an unfair labor practice and

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[1] After the Board amended the union's certification, the Retail Clerks merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL-CIO. The Board accepted this change.

ordered it to bargain. *Financial Institution Employees of America*, 245 N.L.R.B. 700 (1979).

In reaching its decision to amend the union's certification, the Board followed its established practice of conducting "due process" and "continuity" determinations.[2] A "continuity" finding between a pre- and post-affiliation union has traditionally been the prerequisite for the Board's amendment of a union's certification. In this case, the Board found continuity between the pre- and post-affiliation union. 241 N.L.R.B. at 752. In amending the union's certification and ordering the Bank to bargain, the Board specifically relied upon a contemporaneous case, *Amoco Production Co. (Amoco III)*, 239 N.L.R.B. 1195 (1979), in which the Board found continuity despite the fact that non-union members had not been allowed to vote on the affiliation question. In *Amoco III*, the Board stressed that affiliation elections are internal union matters; thus, the Board did not require non-union employees to participate in those elections. Amoco Production Company appealed *Amoco III* to the Fifth Circuit; Seattle-First National Bank appealed the instant case to this circuit.

The Fifth Circuit remanded *Amoco III* to the Board for a statement of facts supporting the Board's affirmative continuity determination. *Amoco Production Co. v. NLRB*, 613 F.2d 107, 112 (5th Cir. 1980). The Board's opinion had failed to set out those facts and the court could not determine whether the Board's continuity finding was supported by substantial evidence. *Id.* After the Fifth Circuit's remand, the Board asked us to remand as

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[2] "Due process" in the context of the Board's review of affiliation decisions is discussed *infra* pp. 8-9, 22-23, and note 6. "Continuity" means that the union, even though newly affiliated with another labor organization, is essentially the same union that the Board originally certified to represent the bargaining unit. *See infra* pp. 9-11 (describing the continuity determination process).

well because our case was analytically linked to *Amoco III*. We complied. *Seattle-First National Bank v. NLRB*, Nos. 80-7004, 79-7515 (9th Cir. June 27, 1980) (order granting Board's motion for remand).

On remand from the Fifth Circuit, the Board, by a 3-2 vote, overruled *Amoco III* and concluded, in *Amoco Production Co. (Amoco IV)*, 262 N.L.R.B. 1240 (1982), that affiliation decisions were *not* internal union matters. The Board held that a unit-wide vote on affiliation was a necessary prerequisite to obtaining an amended certificate showing the new affiliate as the successor bargaining representative. The Board declared that "due process" required a unit-wide vote and because a unit-wide vote had not been taken, the Board did not reach the continuity issue. The Board then revoked its earlier amendment of the union's certification and dismissed the unfair labor practice complaint against the employer, which had been based on the employer's repudiation of the existing contract and refusal to bargain. The union appealed the Board's *Amoco IV* decision to the Fifth Circuit.

Similarly, the Board, by a 3-2 vote, changed its earlier opinion in our case and followed *Amoco IV*. The Board's opinion states that excluding nonmembers from voting in affiliation decisions violates "fundamental due process standards." *Seattle-First National Bank*, 265 N.L.R.B. No. 55, slip op. at 3 (Nov. 18, 1982). The Board revoked the newly-affiliated union's amended certification and dismissed the previously-granted refusal to bargain/unfair labor practice charge against the bank. The Board did not reconsider whether continuity existed between the pre- and post-affiliation union. The union petitioned for review.

In the *Amoco IV* appeal, the Fifth Circuit affirmed the Board's new ruling after acknowledging the existence of "strong arguments to the contrary." *Local Union No. 4-14 v. NLRB*, 721 F.2d 150, 152-53 (5th Cir. 1983). In

a brief opinion, the court deferred to the Board, explaining, "we are unable to say that the general ruling that now requires the participation of nonunion members in an affiliation election is irrational or inconsistent with the Act . . . ." *Id.*

B. *Effect of the Board's New Rule*

Unless a union puts an affiliation decision to a vote of all employees in the bargaining unit, the Board will not consider whether sufficient continuity exists between a pre- and post-affiliation union to justify amending the union's certification. Generally, the Board will not enforce an employer's duty to bargain in good faith under § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982), unless the newly-affiliated union has had its certificate amended. This means that under the Board's new rule an employer may, with impunity, refuse to bargain with any union that affiliates without permitting non-union employees to participate in what until recently was considered an internal union affair. In effect, the Board now requires that *all* union affiliation decisions be put to a vote of all employees, union and non-union, in the bargaining unit.[3]

The Board changed the rule because it now believes that affiliation is not an internal union matter. Instead, the Board suggests that affiliation by its very nature implicates the guaranteed rights of all employees to a bargaining representative selected by the majority. Under the Board's new approach, an affiliation decision will always call a union's continuing majority status into question.

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[3] See, for example, *Amoco IV*, in which the Board refused to amend the union's certification because non-union employees were not allowed to vote in an affiliation decision. There, even if all non-union employees had voted and all of them had voted against affiliation the unit as a whole would have approved the affiliation.

STANDARD OF REVIEW

The Board's decision in this case announces an altered interpretation of the National Labor Relations Act.[4] In reviewing such decisions, we accord the Board's interpretation substantial deference and review the decision for "rationality and consistency with the Act." *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981); *see Ford Motor Co. v. NLRB*, 441 U.S. 494, 497 (1979); *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984). Therefore, we will uphold the new rule if it is rational and consistent with the NLRB, and we will reject the rule if it is not.

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[4] The Bank and the amicus U.S. Chamber of Commerce discuss extensively the factual merits of the union's actual continuity. If we grant the union's petition, the Bank suggests that we should deny the union amended certification because of the substantial lack of continuity between the pre- and post-affiliation union. The Chamber of Commerce, on the other hand, suggests that we should consider the factual merits first, and therefore need not review the rule because the post-affiliation union allegedly differs substantially from the pre-affiliation union. We are unable to comply with either request. When the Board, in the wake of the Fifth Circuit's remand of *Amoco III*, asked us to remand the case in which the Board considered the continuity factors, we complied. Thus, we are without power to consider the factual continuity question because such determinations are the province of the Board, subject only to our review to ensure that those decisions are based on "substantial evidence." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Retail Store Employees Local 428 v. NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975).

The union also asks us to consider the factual merits and then to reinstate the Board's prior continuity finding, the earlier amended certification, and the unfair labor practice finding against the Bank. As we have just explained, the case in which the continuity decision favorable to the union was made is no longer before us. The case before us involves only the Board's new rule. *See also infra* note 16.

DISCUSSION

A. *Background: Certification, Affiliation, and Continuity Decisions*

Section 7 of the NLRA guarantees employees the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1982). Section 9(a) of the NLRA mandates that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives" of the unit's employees. 29 U.S.C. § 159 (a) (1982). Once the Board is satisfied that a union is the chosen representative of a unit's employees in accordance with § 7,[5] the Board will certify the union as the unit's exclusive bargaining representative under § 9(a). A union seeks certification as the exclusive bargaining representative for many reasons, not the least of which is to gain the NLRA's protection if the employer commits an unfair labor practice. *See, e.g.*, 1 C. Morris, *The Developing Labor Law* 341 (2d ed. 1983).

Under certain circumstances, a certified bargaining representative may lose substantial support within the union or the unit as a whole. When this happens, the employees, whether union or non-union, may ordinarily petition the Board to decertify the union. 29 C.F.R. § 101.17 (1983). If, after investigating the petition, the Board determines that "a question of representation" exists, the Board must hold a hearing to decide whether the union should continue to represent the unit. NLRA § 9(c)(1)(A)(ii), 29 U.S.C. § 159(c)(1)(A)(ii) (1982). At least 30% of the unit's employees' must support the

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[5] For example, the Board may be satisfied after a Board-supervised election or after the employer's voluntary acceptance of authorization cards in favor of the union signed by a majority of the unit's employees.

decertification petition before the Board will hold a new representation election. 29 C.F.R. § 101.18.

As the Board has recognized, an independent union may decide to affiliate with a national or international union for diverse reasons. *See Amoco III*, 239 N.L.R.B. at 1195. These include access to an enhanced financial base, greater bargaining expertise, and increased bargaining strength. In the past, an independent union wishing to affiliate would first hold an election among its members according to procedures established in the union's constitution and bylaws. If the members voted to affiliate, the union would then petition the Board to amend the union's certification to designate the newly-affiliated union as the exclusive bargaining representative of the unit under § 9(a). In the absence of a "question concerning representation," the Board would amend the certification. *See* 29 C.F.R. § 102.60(b).

Before altering its position in *Amoco IV*, the Board adhered to the following procedure to determine if a "question concerning representation" had arisen. The Board first inquired into whether the affiliation decision was made with sufficient "due process" to ensure that, as a threshold matter, the decision reflected the wishes of the union's members. The Board inquired into whether the affiliation election was "conducted under democratic procedures," with sufficient due process to guarantee that the "election represents the majority view of the *members of the union.*" *NLRB v. Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir. 1975) (emphasis added). The election procedures must not be so "lax" or "substantially irregular" as to "negate the validity of the election." *NLRB v. Commercial Letter, Inc.*, 496 F.2d 35, 42 (8th Cir. 1974); *see also NLRB v. Bear Archery*, 587 F.2d 812 (6th Cir. 1977) (enforcement of continuity finding denied because of inadequate due process in election procedures). The

due process inquiry has always been used to protect union members' rights in the affiliation decision process.[6]

Once assured that the rights of union members had not been violated, *see, e.g., Amoco III*, 239 N.L.R.B. at 1196, the Board conducted an investigation into whether "continuity of representation" existed between the pre- and post-affiliation union. The continuity inquiry addressed both union members' and non-union members' interests in continued representation by the representative that had been selected by the majority. The Board's inquiry thus focused on whether the union was substantially changed by the affiliation. In the words of the classic formulation of the essential inquiry:

> [T]he right of a successor union to assume the status of a certified bargaining agent held by its predecessor depends on a factual issue—is the new union a continuation of the old union under a new name or affiliation or is it a substantially different organization?

Carpinteria Lemon Association v. NLRB, 240 F.2d 554, 557 (9th Cir. 1956).[7]

In making its continuity determination, the Board considered such factors as continuation of unit autonomy, retention of local officers, and continuation of established

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[6] This is the stage where the Board's new rule would have its impact. The procedural difference between the old and the new rule is the requirement of a unit-wide vote as part of the threshold due process inquiry. *See infra* p. 23.

[7] For an early discussion of the continuity principle, see *NLRB v. Harris-Woodson Co.*, 170 F.2d 720 (4th Cir. 1950). Board decisions on this subject include *Jasper Seating Co.*, 231 N.L.R.B. 171 (1977); *Bear Archery, Div. of Victor Comptometer Corp.*, 223 N.L.R.B. 1169 (1976), *enforcement denied*, 587 F.2d 812 (6th Cir. 1977); *Hamilton Tool Co.*, 190 N.L.R.B. 571 (1971); *North Elec. Co.*, 165 N.L.R.B. 88 (1967); and *East Ohio Gas Co.*, 140 N.L.R.B. 1269 (1963).

union procedures (such as grievance procedures, voting procedures, and bylaws). *Compare Retail Store Employees Union Local 428 v. NLRB*, 528 F.2d 1225, 1228 (9th Cir. 1975) (continuity not found where pre-affiliation union officers no longer participated in actual negotiations over collective bargaining issues with management after affiliation) with *Carpinteria Lemon*, 240 F.2d at 557 (continuity found where only name change occurred), and *Hamilton Tool Co.*, 190 N.L.R.B. 571, 575 (1971) (continuity found where bank accounts, checkoff authorizations, and membership remained the same). So long as continuity existed, the Board considered affiliation decisions as internal union matters that did not necessarily affect the status of the union as the exclusive bargaining representative of its unit.[8]

Thus, the purpose of the due process determination was to protect union members' interests while the purpose of the continuity determination was to protect employees' § 7 and § 9(a) rights by enabling the Board to call a new representation election whenever the affiliation posed a "question concerning representation." Until now, the Board believed that a continuity determination was sufficient to protect employees' § 7 and § 9(a) rights because that process allowed the Board to require a vote, on a case-by-case basis, whenever the Board questioned whether a union's affiliation implicated those rights. When no question regarding due process or representation arose, the Board certified the newly-affiliated union and thus avoided unnecessary interference in a fundamentally internal union matter. Now, however, the Board implies that the continuity determination is inadequate to protect

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[8] There has been a continuing discussion within the Board, however, about whether affiliation decisions are internal union matters. See *Amoco III*, *Amoco IV*, *Jasper Seating Co.*, 231 N.L.R.B. 171 (1977), and *North Electric Co.*, 165 N.L.R.B. 88 (1967), for examples of cases with both majority and dissenting views on this point.

employees § 7 and § 9(a) rights and that both the due process and continuity inquiries must focus on those rights.

B. *Analysis: Why the New Rule Must Be Rejected*

After considering this matter thoroughly, we have concluded that the Board's new rule is irrational and inconsistent with the National Labor Relations Act. At least three reasons compel our conclusion. First, the rule is inconsistent with the longstanding federal labor policy, repeatedly recognized by the Supreme Court, to avoid unnecessary interference in internal union affairs. Second, the rule is inconsistent with the NLRA's primary purpose of promoting industrial peace. Third, the rule is irrational because the Board's existing due process and continuity determination procedures adequately protect employee rights without imposing on union members' rights or otherwise being inconsistent with the NLRA.

1. *The Rule is Inconsistent with the Policy of Noninterference in Internal Union Matters*

The Board's new rule violates the longstanding federal labor policy of avoiding unnecessary interference in internal union affairs.[9] The Supreme Court has repeatedly

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[9] Although the Board's earlier cases characterize affiliation decisions as internal union matters, the Board now suggests that an affiliation by its very nature always implicates employees' § 7 right to choose their bargaining representative. And, because § 9(a) of the NLRA requires that the exclusive bargaining representative of a unit must be chosen by a majority of the employees in the unit, the Board now suggests that *any* affiliation constitutes a sufficient change in the character of the union to call the initial employee choice of bargaining representative into question. The Board's new position is essentially that affiliations are never simply internal union affairs.

The union, on the other hand, argues that affiliation decisions are entirely internal union matters. The union asserts that federal

recognized this policy. *See, e.g., NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *see also NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (Board interference with union rule held unjustified); *Scofield v. NLRB*, 394 U.S. 423 (1969) (same); *cf. United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (union rule upheld against challenge by employees). These cases convince us that we should reject the Board's rule because it interferes with the conduct of internal union affairs without any countervailing justification.

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labor policy precludes Board interference in such decisions. *See infra* pp. 12-16 & note 15.

As a practical matter, we believe that affiliation decisions are internal union matters that may in some cases have sufficient external ramifications to call non-union members' § 7 and § 9(a) rights into question. Many affiliation decisions work minimal changes; for example, the decision may involve only a name change. *See, e.g., Carpinteria Lemon Ass'n v. NLRB*, 240 F.3d 554, 557 (9th Cir. 1957) (continuity found where only name change occurred). We cannot see how such a change could be anything other than an internal union affair. Some affiliation decisions may have a significant external impact on the § 7 and § 9(a) rights of all employees in the bargaining unit, as, for example, when the local relinquishes its power to call a strike to the international or when the local authorizes the international to select local officers. *See, e.g., Retail Store Employees Local 428 v. NLRB*, 528 F.2d 1225, 1228 (9th Cir. 1975) (continuity not found where pre-affiliation union officers no longer negotiated collective bargaining matters with management: "This leadership change suggests an absence of continuity where it counts, in a bargaining relationship.").

Even when the affiliation decision results in substantial change in the union, the actual decision to affiliate is internal, but the decision's external ramifications could justify the Board's refusal to amend the union's certification. We therefore accept the union's characterization of all affiliation decisions as internal union affairs, and emphasize that the Board is not justified in interfering with such affairs. The Board can justify its interference only *after* the Board has conducted a continuity determination and finds that a "question concerning representation" exists. The Board's proper function is to decide the matter on a case-by-case basis. *See infra* p. 16 & note 12.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), provides perhaps the strongest statement of congressional intent to limit unnecessary interference in internal union affairs. In upholding a union rule that imposed sanctions on union members who crossed a picket line during a strike, the Court explained the structure of the NLRA, and how its majority rule concept is applied:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . The employee may disagree with many of the union decisions but is bound by them. "*The majority-rule concept is today unquestionably at the center of our federal labor policy.*" "The complete satisfaction of all who are represented is hardly to be expected. . . ."

388 U.S. at 180 (footnotes and citations omitted) (emphasis added). In keeping with this policy, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . ." *Id.*

In explaining that an element of the "majority rule concept" reserves union decision-making to union members, the Court added that "*nonunion employees have no voice in the affairs of the union.*" 388 U.S. at 191 (emphasis added).[10] The affairs of the union are those that relate

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[10] The *Amoco IV* dissent emphasizes one reason why affiliation decisions are internal union affairs:

> Any tension between the right of members of the unit to a voice in their representation and the right of members of a

to the union's self-goverance. Congress intended to restrict union self-goverance only in very narrow circumstances not present in this case. "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. "[A] union could fine a member [for breaking a union rule] but that same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority . . . ." *Scofield v. NLRB*, 394 U.S. at 428; *see also United Steelworkers v. Sadlowski*, 457 U.S. at 115-19 (discussing congressional intent to limit interference in union self-governance). In *Allis-Chalmers*, the Court further examined the legislative history of the NLRA and found that Congress had repeatedly condemned outside interference in internal union affairs. *See, e.g.*, 388 U.S. at 187-95.

The non-interference policy extends to interference by the Board. When a union rule has not clearly violated a policy of the NLRA, the Court has limited the Board's power to interfere in internal union affairs. *See Scofield v. NLRB*, 394 U.S. at 432 (upholding union rule, enforceable by fines and expulsion, imposing limitation on immediate pay that members could receive for piecework because Court found no "impairment of statutory labor policy"); *NLRB v. Boeing*, 412 U.S. at 74-75 (upholding position that Board lacked power to review reasonableness of union disciplinary rule imposed on members

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union to decide for themselves the future of their union must be resolved in favor of the union membership. It is the union member who is most affected by union affiliation. In contrast, the effect of affiliation on the unit member who has elected not to join the labor organization which represents him is indirect.

Amoco IV, 262 N.L.R.B. at 1242. The dissent also aptly points out that non-union members interested in an affiliation decision are free to join the union. *Id.*

who crossed picket line). Thus, the Court will not allow the Board to interfere with a union rule unless the rule significantly impinges on a policy of the NLRA.

Congress' concern for insulating internal union affairs from unnecessary interference is also found in the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1982). The entire focus of the Landrum-Griffin Act is on internal union affairs, with the object of preventing abuses of power as well as racketeering in union management. *See* 29 U.S.C. § 401.[11] In *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the Supreme Court explained:

> Additional evidence that Congress regarded the union's desire to maintain control over its own affairs as legitimate is provided by the history of other sections of the [Landrum-Griffin Act]. In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. . . . Congress' desire to permit unions to regulate their own affairs and to minimize governmental intervention suggests that it would have endorsed union efforts to reduce outsider influence.

457 U.S. at 117 (some citations omitted). In *Sadlowski*, the Court upheld a challenged union rule that prohibited non-union members and non-employees from contributing

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[11] See *Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S. Ct. 615, 622-26 (1984) and *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489-95 (9th Cir. 1984), for examples of the examination of the legislative history of one act to ascertain congressional intent in another act in the same statutory scheme.

to union election campaigns because the rule served "a legitimate purpose that is clearly protected under the statute" even though the rule may have impinged on employee rights to free speech guaranteed by § 101(a)(2) of the Landrum-Griffin Act. 29 U.S.C. § 411(a)(2). *See* 457 U.S. at 115.

At a minimum, these cases demonstrate that the policy of non-interference in internal union affairs occupies an important position in the scheme of our national labor laws. Bearing this in mind, we must find that the Board's new rule is inconsistent with the NLRA because the rule interferes in an internal union decision without sufficient justification. Like the union rules in the cases discussed above in which the Court barred Board interference, the affiliation decision process is an internal union matter. And, like the Court in those cases, we find that the union practice—limiting affiliation decisions to union members—does not impair a statutory labor policy.

The new rule, on the other hand, will result in interference in internal union affairs by non-members, employers (through refusals to bargain), and the Board. The new rule mandates that a continuity determination may not be conducted until after a unit-wide vote is taken. *See Amoco IV*, 262 N.L.R.B. at 1241 n.7. This puts the cart before the horse. Only *after* the Board conducts a continuity determination and finds a "question concerning representation" can the Board justify its intervention.[12] Under the new rule, by requiring a unit-wide vote even when continuity exists between a pre- and post-affiliation union, the Board inevitably interferes in internal union affairs without justification. In those cases, no "impairment of a statutory labor policy" (here the

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[12] We are not called upon to decide which changes resulting from an affiliation justify the Board in finding a "question concerning representation." Such factual decisions must be reviewed for substantial evidence on a case-by-case basis. *Retail Store Employees Local 428*, 528 F.2d at 1227.

protection of employees' § 7 and § 9(a) rights) can justify the Board's intervention. *See Scofield v. NLRB*, 394 U.S. at 432.

2. *The New Rule is Inconsistent with the Policy of Promoting Stability in the Bargaining Representative*

The Board's new rule is also inconsistent with the strong national policy of maintaining stability in the bargaining representative to achieve the NLRA's primary purpose—preserving industrial peace. 29 U.S.C. § 151 (1982). *See NLRB v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981). In *Silver Spur* we explained:

> The most valued objective of the Act is industrial peace. . . . [T]he Board [has determined] that industrial peace is more likely to be achieved by maintaining continuity in the bargaining structure. . . . [T]he Board has favored continuity in the bargaining structure over the enhancement of employee free choice.

Id.

The policy of preserving stability in the bargaining structure even at some expense to employee free choice is manifested throughout the intricate web of rules the Board has constructed through years of overseeing national labor relations. To take just three examples, this policy is reflected in (1) employer refusal-to-bargain cases, (2) § 9(c)'s decertification procedures, and (3) the contract-bar rule.

First, in employer refusal-to-bargain cases, unions are accorded several presumptions of majority status. After initial certification by the Board, a union enjoys an irrebuttable presumption of majority status for one year, and a rebuttable presumption thereafter, even in the absence of a contract. *Brooks v. NLRB*, 348 U.S. 96

(1954); *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838 (9th Cir. 1978); *NLRB v. Top Manufacturing Co.*, 594 F.2d 223, 224 (9th Cir. 1979). To rebut the presumption, an employer must demonstrate a good faith belief that a certified union lacks majority status. *See Silver Spur*, 623 F.2d at 578-79; *Pioneer Inn*, 578 F.2d at 839-41; *see also NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301-02 (9th Cir. 1978) ("[T]he threat to industrial peace must be counter-balanced by good cause."). This is not an easy showing for an employer to make. *See* 1 C. Morris, *The Developing Labor Law* 540-49 (2d ed. 1983). The presumptions restrict the opportunities to challenge a certified bargaining representative's majority status.

Second, under its decertification procedures, the Board will consider decertification only if a sizable percentage—30%—of the employees present a petition, 29 C.F.R. § 101.18, or in "extreme cases," R. Gorman, *Labor Law—Basic Text* 49-50 (1976) ("extreme cases" occur when a union has been discriminating on the basis of race or any other impermissible basis). Decertification requires a strong showing of employee dissatisfaction or other "extreme" justification. In this case, the Board's new rule effectively decertifies the newly-affiliated union before any inquiry is conducted into the character of the union or its support among employees. This result runs completely counter to the policy of promoting stability in the bargaining representative.

Third, under the contract-bar rule,

> the Board refuses to conduct decertification elections —whether requested by the employer, employees, or another union—during the life of the contract. *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955). The rule was adopted to protect the bargaining atmosphere, *id.*, and is applied *even if a majority of the employees withdraw their support.*

Pioneer Inn, 578 F.2d at 838 (emphasis added). To "protect the bargaining atmosphere," the contract-bar rule limits the occasions when the Board will consider challenges to a certified bargaining representative's majority status. The Board here, as was true of the employer in *Pioneer Inn*, "does not seek a decertification election, [the Board] seeks the same result by professing a doubt of majority status" without complying with the strict requirements for decertification. *Id.*

The Board's new approach seriously undermines the stability objectives protected by the contract-bar rule. For example, in the *Amoco* cases, the employer unilaterally cancelled the current contract when notified that the bargaining representative had affiliated with another union despite the fact that the contract did not expire for another 17 months. *See Amoco Production Co. v. NLRB*, 613 F.2d at 109. The employer argued that it need not recognize the contract nor bargain with the newly-affiliated union until a new unit-wide representation election was held. Although the Board has repeatedly and properly found such conduct to violate the NLRA, *see Amoco Production Co.*, 220 N.L.R.B. 861, 865 (1975); 233 N.L.R.B. 158, 161-62 (1977); and 239 N.L.R.B. 1195 (1979) (*Amoco III*), this unlawful conduct is condoned under the Board's new rule. *Amoco IV*, 262 N.L.R.B. 1240 (1982).

These rules illustrate that the Board cannot interfere with the certified bargaining representative's status without just cause. Congress and the Board have determined as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status. Because it effectively decertifies a union before the Board can establish any basis for a union's loss of majority status, the new rule is inconsistent with this national labor policy.

3. *In Light of Effective Longstanding Procedures, it is Irrational to Adopt the New Rule.*

The Board's rule is irrational for at least two reasons.[13] First, the rule is unnecessary to protect legitimate employee interests because the existing due process and continuity procedures adequately protect those interests. Second, the Board's reasoning does not support the rule.

(a) *Existing procedures adequately protect employee interests and are consistent with federal labor policy.*

The Board's previously-followed due process and continuity determination procedures adequately protected the critical rights of employees to be represented by a union selected by a majority of employees in the unit while also protecting union members' rights to run their internal affairs free from unnecessary outside intervention. The procedure allowed the Board to require a post-affiliation representation election on a case-by-case basis if a "question concerning representation" arose. Where no question arose because the affiliation resulted in an insubstantial change in the certified bargaining representative, the Board recognized the change as a purely internal union matter and amended the certification of the newly-affiliated union without a unit-wide election. It is irrational to discard an effective procedure that neither (1) unnecessarily interferes in internal union affairs, (2) unnecessarily destabilizes the bargaining representative, nor (3) unnecessarily discourages the legitimate decision of independent

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[13] For additional criticism along these lines, see Hale, *Union Affiliations: Examination of the Governing NLRA Standards*, 3 Det. C.L. Rev. 709, 732-37 (1983). Hale argues convincingly that the Board's rule is not based on any statutory authority and that it will lead to temporary denials of representation in some cases where a majority of all unit employees unquestionably desire affiliation.

unions to affiliate, in favor of a new procedure that presents all of those risks.

Moreover, we have previously recognized that the existence of adequate safeguards to protect employees' § 7 and § 9(a) rights obviates the need for alternate protective actions. For example, in *Silver Spur*, the employer refused to bargain with the certified bargaining representative and claimed that the union no longer enjoyed majority status. In rejecting the employer's claim that the refusal to bargain was in the interest of protecting employees' § 7 and § 9(a) rights, we noted that if a majority of employees in a bargaining unit no longer supported the union, they could seek the union's decertification. 623 F.2d at 578.[14] Here, the Board's continuity determination protects employees § 7 and § 9(a) rights, and the employees' right to petition for decertification remains an additional and viable option for employees genuinely disgruntled by a union's affiliation decision.

(b) *The Board's Opinion Does Not Justify its Rule.*

The Board's opinion asserts that the new rule is needed to preserve "fundamental due process rights" for all employees. 265 N.L.R.B. No. 55, slip op. at p. 3. We must assume that the Board also bases its changed rule on a concern for employees' § 7 and § 9(a) rights. The Board's reasoning is flawed on both of these grounds; we have already demonstrated the error in the Board's reliance on the latter ground.

The Board's opinion specifically casts the new rule as a modification of the Board's traditional "due process" inquiry.[15] This approach is unpersuasive. The "due proc-

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[14] *See supra* pp. 7-8.

[15] *See supra* pp. 8-9 and note 6. The union contends that there is no rational basis at all for any "due process" inquiry by the Board. We disagree. With regard to the "due process" inquiry,

ess" inquiry has always been aimed at assuring that democratic voting *procedures* are observed in affiliation elections to protect union members' rights to manage their internal affairs and to be represented by the organization of their choice. *See NLRB v. Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir. 1975) ("principle question is whether in fact the election represents the majority view of the members of the union"). For example, the Board has required the use of secret ballots to avoid any possibility of coercion. By placing the new rule in the context of the "due process" inquiry, the Board avoids considering its legitimate and appropriate inquiry: does the affiliation decision harm non-members' § 7 and § 9(a) interests?

As a practical matter, applying the new rule at the "due process" inquiry stage of the Board's certification amendment procedure makes little sense. The Board's new rule makes the required unit-wide vote a prerequisite for the Board's conducting a continuity determination. The new rule's insertion of a unit-wide vote at this stage of the affiliation process results in duplicative procedures. Under the Board's new rule, a union would first put the affiliation question to a unit-wide vote of union and non-union employees. If the unit voted affirmatively, the union members could then vote to affiliate. Once the union voted to affiliate and asked the Board to amend the union's certification, the Board would still step in and conduct a continuity determination. Despite the fact that a majority of the unit, union and non-union employees combined, had already voted affirmatively on the affiliation question, the Board would nonethless call a formal unit-wide representation election if the Board found that the post-affiliation union was substantially different from the pre-affiliation union. Despite the Board's protestation at oral argument that the two unit-wide votes would differ in their formality, we believe that the process is unreasonably duplicative.

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we hold only that the unit-wide vote is not an appropriate part of that inquiry.

The Board also states that a pre-affiliation unit-wide vote is essential to maintain the integrity of the Board's certification and election procedures. This assertion is also unpersuasive. Its earlier continuity determination process allowed the Board to call for a Board-supervised election whenever the Board found a "question concerning representation." The Board's new rule merely requires an informal, non-Board-supervised election in pre-affiliation decisions. We fail to see how imposing a non-Board-supervised election, even when no representation question arises, enhances the integrity of the Board's certification and election procedures.[16]

CONCLUSION

The Board's new rule is inconsistent with federal labor policy because it unnecessarily interferes with internal union affairs and bargaining structure stability. Such interference is irrational because the Board's prior case-by-case approach adequately protects employees' § 7 and § 9(a) rights without such interference. The Board's new rule is therefore neither consistent with the NLRA's purposes nor rational.

Accordingly, we GRANT the union's petition for review and REMAND the matter to the Board for further proceedings consistent with this opinion.

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[16] The Board, in its brief, also seeks to support its decision by arguing that the union in this case was substantially changed by its affiliation. The Board appears to be supporting its new rule, at least in part, by arguing that continuity might not be found in this case anyway. As the U.S. Chamber of Commerce's amicus brief cogently explains, however, the Board's opinion involves no factual analysis and treats the issue exclusively as a matter of law. We must therefore review the decision as a matter of law. *See supra* note 4.

In any event, the facts of this case could not justify the Board's new rule because the rule would also apply to situations in which 90% of the unit employees are union members and all of them vote for affiliation.

WRIGHT, Circuit Judge, dissenting:

The National Labor Relations Board has decided that a union affiliation election does not satisfy the requirements of due process if nonmembers are ineligible to vote. *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982). I do not find that position irrational or inconsistent with the National Labor Relations Act, 29 U.S.C. §§ 151-169, and would affirm. *See Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978).

The Fifth Circuit has enforced the Board's rule. *Local No. 4-14, Oil, Chemical & Atomic Workers International Union v. NLRB*, 721 F.2d 150 (5th Cir. 1983). It identifies "the crux of the Board's reasoning":

> "If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least, be afforded *the opportunity to vote.* It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection."

Id. at 152 n.2 (quoting *Amoco Production*, 262 N.L.R.B. at 1241 (quoting *North Electric Co.*, 165 N.L.R.B. 942, 944 (1967) (dissent))).

The Fifth Circuit noted that "[s]trong arguments" for the contrary rule "were adopted by the Board in its earlier rulings that were overruled" by the new ruling. *Id.* at 152. It concluded that "Although the Board earlier

vacilated [sic] somewhat in establishing a rule . . ., [it] clearly articulated reasonable grounds for this later change." *Id.*

The court stated:

> [W] are unable to say that the general ruling that now requires the participation of nonunion members in an affiliation election is irrational or inconsistent with the Act, or that it is beyond the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees.

Local Union No. 4-14, 721 F.2d at 152-53. I agree. That one circuit already has concluded that the Board's position is rational reinforces my position. An intercircuit conflict over the rationality of the Board's decision is unwarranted.

The majority explains at length its reasons for reaching the opposite conclusion. It engages in the balancing of interests that is the province of the Board, not the courts.

First, does the new rule unnecessarily interfere with internal union affairs? The Board has concluded that an affiliation election is not an internal union affair, but involves the selection of a bargaining representative. *Amoco Production*, 262 N.L.R.B. at 1241. While the Board has presumed in the past that an affiliation election was an internal union affair unless a question concerning continuity of representation arose, it may change its application of the Act "in light of its cumulative experience." *Beth Israel Hospital*, 437 U.S. at 508.

The Board has concluded that affiliation election voting rights for nonmembers are necessary to preserve their right to participate in the selection of a bargaining representative. *See* 29 U.S.C. § 157. The bargaining unit here consists of about 4800 employees, of which 2824 are union

members. Only 1206 member employees voted for affiliation; 774 voted against it.

The majority opinion concludes that requiring participation of nonmembers constitutes an unwarranted interference with internal union affairs. While the majority may give preservation of union autonomy higher priority, we are required to defer to the Board's expertise. *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962); *Texaco, Inc. v. NLRB*, 700 F.2d 1039, 1042-43 (5th Cir. 1983). The Board need only justify its position within the statutory framework. *Beth Israel Hospital*, 437 U.S. at 501; *Local Union No. 4-14*, 721 F.2d at 152.

Second, is the Board's rule inconsistent with the promotion of stability in the bargaining representative? The majority opinion states that this is a situation in which the promotion of stability of the bargaining representative should prevail over individual employees' rights to free choice. A change in affiliation is a change in the status of the bargaining representative. Under the new rule, nonmembers may not force affiliation because the decision to hold an affiliation election remains the province of the union. The Board's rule will promote stability more effectively than did its former position.

Third, is the Board's new rule irrational? The majority contends that irrationality is established by the adequacy of the old procedure and the inadequacy of the Board's reasoning.

The adequacy of the old procedure is irrelevant. We should instead determine whether the new rule is rational and consistent with the Act. The merit or sufficiency of the previous rule should not control.

The majority lists risks that it considers created unnecessarily by the change in procedure. I would defer to the Board's conclusions as to the necessity of the new rule.

Those risks each identify a policy, the protection of which is discussed elsewhere in this opinion.

The Board has not avoided the appropriate statutory inquiry. It has decided that the right of nonmembers to select their bargaining representative will be protected adequately only if they may participate in affiliation decisions. Therefore, due process fairness and the integrity of the certification process require the right to participate in affiliation elections.

I would affirm.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[Filed Dec. 26, 1984]

ORDER DENYING PETITION FOR REHEARING AND REJECTION [sic] SUGGESTION FOR REHEARING EN BANC

Before: WRIGHT, PREGERSON, and FERGUSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Hon. Robert R. Beezer did not participate in the consideration of this matter.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

KENNEDY, Circuit Judge, with whom SNEED, ANDERSON, and HALL, Circuit Judges, join, dissenting from denial of rehearing en banc:

I dissent from the court's failure to hear this case en banc and to consider the conflict we create with the Fifth Circuit on an important issue of labor law. *See Local Union No. 4-14 v. NLRB*, 721 F.2d 150 (5th Cir. 1983).

Quite apart from the labor law question presented, the panel opinion is disturbing for a misapplication of a fundamental legal category, the concept of reason. Since the writings of Cicero, if not before, it has been recognized that the fair application of law to a particular dispute, as well as the underlying theory of justice in a more universal sense, depends on reason. Cicero, *De Legibus* Book II (C.W. Keyes trans. 1977). Reason is a juridical concept essential for the constancy of our decisions, and we undermine it if we use the term "irrational" to express disagreement with a proposition supported by articulated premises within the boundaries of tenable argument.

We must uphold a Board rule unless it lacks rationality or is inconsistent with the statute. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978); *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). It is no accident that rationality is the standard used to scan the authority of the Board to adopt its rules. The deferential standard of review is a recognition of the Board's central function in the legal process. The Board faces difficult choices and may make close, even debatable, decisions regarding the implementation of national labor policy. Its rulemaking power is an ongoing process in which the Board is free to change its position, guided by the experience it has gained in the administration of the Act. *Beth Israel Hospital*, 437 U.S. at 508.

Here the Board was required to implement the basic policy of free choice for all employees in the selection of

a bargaining representative, as provided by sections 7 and 9(a) of the National Labor Relations Act. 29 U.S.C. §§ 157, 159(a) (1982). The Board saw the question to be not whether the union could change its affiliation, but whether it could change its affiliation *and* remain the bargaining agent of all the employees in the unit. It concluded that all affected employees, not merely union members, must be permitted a vote on the proposed change. The argument the union makes that this is a matter of internal union concern is respectable, but its rejection was not irrational. Neither the Board in announcing the rule nor the Fifth Circuit in sustaining it acted outside the bounds of reason.

Upon these considerations and those further expressed by Judge Wright in his dissenting opinion, I dissent from the failure of the court to hear the case en banc.

NORRIS, Circuit Judge, with whom POOLE and HALL, Circuit Judges, join, dissenting from denial of rehearing en banc:

I also dissent from the court's failure to take this case en banc. I simply cannot accept the panel's judgment that the NLRB rule at issue represents "an unreasonable or unprincipled construction of the statute . . . ." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1978). Given the wide latitude we must accord the NLRB's exercise of its rulemaking authority, I agree with the Fifth Circuit that the rule falls within the bounds of NLRB discretion. *Local Union No. 4-14 v. N.L.R.B.*, 721 F.2d 150 (5th Cir. 1983). In my view, en banc review is justified because the panel decision creates an unnecessary conflict in the circuits.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL NO. 1182, etc.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[Filed Jan. 2, 1985]

ORDER

Before: WRIGHT, PREGERSON and FERGUSON, Circuit Judges.

The order filed December 26, 1984 is amended. The second paragraph should read: The full court has been advised of the en banc suggestion and an active judge requested a vote on it. The request having failed to receive a majority of the votes of the active judges, the petition for hearing is denied and the suggestion for rehearing en banc is rejected.

The last sentence on the December 26 order is deleted.

265 NLRB No. 55

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 19-CA-11364 and 19-AC-23

SEATTLE-FIRST NATIONAL BANK

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On September 28, 1979, the National Labor Relations Board issued its Decision and Order in Case 19-CA-11364 [1] finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with Financial Institution Employees of America, Local No. 1182, after it had affiliated with United Food and Commercial Workers International Union, AFL-CIO,[2] and changed its name from Firstbank Independent Employees

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[1] 245 NLRB 700.

[2] Initially, the Local affiliated with Retail Clerks International Union, AFL-CIO. Thereafter, the International merged with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, creating the United Food and Commercial Workers. In Case 19-CA-11364 the Board amended the name of the Charging Party. 245 NLRB 700 at fn. 1.

Association (herein FIEA) to Financial Institution Employees of America, Local No. 1182.[3] The Respondent was ordered to recognize and bargain with the newly affiliated Union. On June 27, 1980, the United States Court of Appeals for the Ninth Circuit granted the Board's motion to withdraw the record on review, and the parties were notified on October 30, 1980, that the Board had decided, *sua sponte*, to reconsider its decision and that statements of position could be submitted. The Board received timely statements of position from the Charging Party and the Respondent.

The Board has reconsidered its decision in light of the entire record and the statements of position and, for the reasons set forth herein, has decided to dismiss the complaint in Case 19-CA-11364 in its entirety, and to dismiss the petition and revoke the amended certification in Case 19-AC-23.

The facts have been fully set forth in the Board's decision and Amendment of Certification, 241 NLRB 751. Briefly summarized they are as follows: FIEA was certified by the Board on November 30, 1970. The parties entered into their initial collective-bargaining agreement in 1971. The most recent collective-bargaining agreement was terminated by the Respondent in 1977.

In 1977 the executive council of FIEA unanimously agreed to seek affiliation with the Retail Clerks. Meetings were held, which were open to all unit members, throughout the State of Washington. At these meetings the affiliation was discussed among with voter eligibility requirements. Eligible to vote were current FIEA members and

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[3] As a result of its affiliation FIEA petitioned the Board to amend its certification. The petition was granted and an Amendment of Certification was issued at 241 NLRB 751 (1979). Thereafter, the Respondent refused to recognize and bargain with the affiliated Union. Accordingly, because of the relationship between Case 19-CA-11364 and Case 19-AC-23 the Board has decided, *sua sponte*, to consolidate them.

those who joined by January 19, 1978. In addition to the meetings, letters were sent to all unit members explaining, *inter alia*, the eligibility requirements. Thereafter, the Washington State Public Employment Relations Commission conducted a secret-ballot election. Ballots were mailed to 2,624 union members; there was approximately 4,800 employees in the unit. Of the union members, 1,206 voted for affiliation and 774 against. On April 1, 1978, FIEA was granted a charter by the Retail Clerks.

The Respondent argues, *inter alia*, that the affiliation election is invalid because only members of FIEA were permitted to vote. In accordance with our recent decision in *Amoco Production Company*,[4] this contention is correct. The issue in *Amoco*, as here, was the validity of a "members only" affiliation vote. The Board held that an affiliation vote in which nonmembers are not permitted to vote violates fundamental due-process standards.

In this case nonmembers were not permitted to vote in the affiliation election. Accordingly, the election did not meet minimal due-process standards and the affiliation was improper. The Respondent, therefore, did not violate Section 8(a)(5) of the Act when it refused to bargain with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO.

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[4] 262 NLRB No. 160 (1982) (Members Fanning and Zimmerman dissenting).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that its Decision and Order in Case 19-CA-11364 (245 NLRB 700) be vacated and the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Amendment of Certification issued in Case 19-AC-23 (241 NLRB 751) be, and it hereby is, vacated.

IT IS FURTHER ORDERED that the petition in Case 19-AC-23 be, and it hereby is, dismissed.

Dated, Washington, D.C., November 18, 1982

JOHN R. VAN DE WATER, Chairman

HOWARD JENKINS, JR., Member

ROBERT P. HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBERS FANNING and ZIMMERMAN, dissenting:

An affiliation election is nothing more than an internal union matter upon which the Board generally will not intrude. For this reason, and as more fully set forth in our dissenting opinion in *Amoco Production Company*,[5] we would find that the affiliation election conducted herein fully met adequate due-process requirements and reaffirm the original decisions.

Accordingly, we dissent.

Dated, Washington, D.C., November 18, 1982

JOHN H. FANNING, Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[5] 262 NLRB No. 160, sl. op., p. 9 (1982).

265 NLRB No. 55

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 19-CA-11364 and 19-AC-23

SEATTLE-FIRST NATIONAL BANK

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

CORRECTION

On November 18, 1982, the National Labor Relations Board issued a Supplemental Decision and Order in the above-entitled proceeding in which an inadvertent error appears on page 2. Please change the last word in body of text from "among" to "along."

245 NLRB No. 88

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-CA-11364

SEATTLE-FIRST NATIONAL BANK *and* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO.[1]

September 28, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

Upon a charge filed on May 8, 1979, by Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union, and duly served on Seattle-First National Bank, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint and notice of hearing on May 21, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National

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[1] The General Counsel moved to amend the name of the Charging Party. Financial Institution Employees of America, Local No. 1182,

Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 5, 1979, following a hearing in Case 19-AC-23, the Board issued its Decision and Amendment of Certification (241 NLRB 751), amending the certification in Cases 19-RM-816 and 19-RC-5301 by substituting "Financial Institution Employees of America, Local No. 1182, chartered by Retail Clerks International Union, AFL-CIO," for "Firstbank Independent Employees Association," herein called FIEA, as the certified bargaining representative of the employees of Respondent in the unit found appropriate in Cases 19-RM-816 and 19-RC-5301,[2] and that commencing on or about April 5, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 31, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. It also filed an application for *subpoena duces tecum*. The Union filed a response to that application.

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chartered by Retail Clerks International Union, AFL-CIO, to reflect the current name of the International Union. We hereby grant that motion.

[2] Official notice is taken of the records in the representation and amendment of certification proceedings, Cases 19-RM-816, 19-RC-5301, and 19-AC-23, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1976), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); and Sec. 9(d) of the NLRA, as amended.

Thereafter, the Union filed a motion for an appropriate remedy, and Respondent filed a response.

On June 12, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 19, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answers to the notice and the complaint, Respondent, in effect, is attempting to relitigate the issues raised in the amendment of certification proceeding. However, Respondent also argues that it has new evidence showing, *inter alia*, that officers of FIEA have been replaced, that statements made by the Union before the affiliation vote have proved unfounded or inaccurate, and that it has possession of numerous petitions from employees indicating that they disagree with the way the affiliation vote was conducted. Respondent, therefore, contends that if the complaint is not dismissed, it should be granted a hearing.[3] We reject this contention. In *Amoco*,

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[3] Respondent also argues that the Board Decision in *Amoco Production Company*, 239 NLRB 1195 (1978) (Member Truesdale concurring, Members Jenkins and Penello dissenting separately), should not be applied retroactively. However, Respondent has failed to demonstrate how the application of *Amoco, supra*, would be an unjust burden on Respondent.

supra, the Board held that a union affiliation proceeding was essentially an internal union matter in which the Board will generally not involve itself. Under *Amoco* the alleged new evidence, even if adduced and credited, would have no effect on the validity of the affiliation vote. We therefore find that Respondent has not raised any issues which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a banking association with an office and place of business in Seattle, Washington, where it is engaged in commercial banking and services. During the past 12 months, a representative period, Respondent has provided services valued in excess of $50,000 directly to customers outside the State of Washington.

We find, on the basis of the foregoing, that Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Financial Institution Employees of America Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[4] The Union's motion for attorneys' fees and other expenses, however, is hereby denied because we cannot conclude that Respondent's defense was "patently frivolous." *Heck's Inc.*, 215 NLRB 765 (1964).

III. THE UNFAIR LABOR PRACTICE

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

2. The certification

On April 5, 1979, the Board amended the certification in Case 19-AC-23 to substitute the Union for FIEA as the bargaining representative of the employees in said unit for the purpose of collective bargaining with Respondent. Since April 5, 1979, the Union has been and continues to be the exclusive representative of the employees in said unit within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 5, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 5, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 5, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative

of the employees in the appropriate unit and that, by such refusal, Rspondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Seattle-First National Bank, State of Washington, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 30, 1970, the above-named labor organization as amended on April 5, 1979, has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 5, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Seattle-First National Bank, Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its various locations where bargaining unit employees are employed copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms

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[5] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading

provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

"Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United State Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

SEATTLE-FIRST NATIONAL BANK

241 NLRB No. 116

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-AC-23

SEATTLE-FIRST NATIONAL BANK *and* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO,
Petitioner.

April 5, 1979

DECISION AND AMENDMENT OF CERTIFICATION

BY CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

On November 30, 1970, the Board, in Cases 19-RM-816 and 19-RC-5301, certified the Firstbank Independent Employees Association (herein FIEA or Petitioner) as the collective-bargaining representative in an appropriate unit of all the Employer's employees within the State of Washington, excluding professional employees, confidential employees, management trainees, and supervisors and guards as defined in the Act. On June 19, 1978, the Petitioner filed this petition to amend the certification to change the name of the certified bargaining agent from "Firstbank Independent Employees Association" to "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO."

A hearing was held on the petition on July 26 and 27, 1978, before Hearing Officer Lynne C. Litwiller at Seattle,

Washington. All parties appeared at the hearing and were given full opportunity to participate therein. After the hearing, the Petitioner and the Employer filed briefs with the Regional Director. Thereafter, the Regional Director transferred the case to the Board for decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The rulings of the Hearing Officer are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:[1]

FIEA has had a collective-bargaining agreement with the Employer since 1971. The current collective-bargaining agreement was terminated by the Employer on October 30, 1977.

During 1977, the executive council of FIEA authorized its bargaining committee to explore affiliation with other unions. The committee, after contacting several unions, voted unanimously to seek affiliation with the Retail Clerks International Union. The affiliation agreement was unanimously approved by the executive council of FIEA. A notice was mailed to all unit representatives (the equivalent of shop stewards) informing them of meetings to

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[1] The Petitioner filed a brief, differing slightly from that filed with the Regional Director, with the Board. The Employer has moved to strike this brief as not being in compliance with Sec. 102.67(i) of the Board's Rules and Regulations, Series 8, as amended. We agree and grant the Employer's motion to strike. The Petitioner has moved to consolidate this case with Cases 19-CA-9835 and 19-CA-9916, also issued this day at 241 NLRB No. 117. The Employer filed a memorandum in opposition. We find that the cases are not similar enough in law or fact to warrant consolidation, and the Petitioner's motion is hereby denied. The Employer has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

be held throughout the State on January 6, 7, and 8, 1978.[2] At these meetings the unit representatives were informed of the terms of affiliation, the election procedure, and the standards for voter elegibility. In order to vote an individual had to be either a current member of FIEA or join by January 19 and pay 1 month's dues of $4. The unit representatives were instructed to contact all unit employees and inform them of the pending affiliation vote and specifically to contact nonmembers and explain to them the eligibility standards. Concurrently a letter was sent to all unit employees informing them of the pending election and the eligibility requirements. After this initial meeting other meetings were held at all work locations. These meetings were attended by officials of both FIEA and the Retail Clerks International Union and were open to all unit employees. On or about January 17 another letter was sent to all unit employees reiterating the eligibility standards.

On January 20 a notice was sent to all FIEA members informing them that a affiliation secret-ballot election would be conducted by the Washington State Public Employment Relations Commission (PERC). The ballots were to be mailed by February 5 and had to be back to PERC by February 21. The notice stated the ballot question and contained additional information regarding the locations of meetings being held throughout the State on February 4 and 5. These meetings were again attended by representatives of both Unions who spoke about the affiliation and answered questions. Two other informational letters were sent to FIEA members before the meetings.

PERC mailed the ballots on February 4 to 2,624 members; there were approximately 4,800 employees in the unit. The results were 1,206 votes for affiliation and 774 against. FIEA applied for, and on April 1 was granted, a charter by the Retail Clerks International Union.

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[2] Hereinafter all dates are in 1978.

The Employer attacks the affiliation on the grounds that: (1) the substitution of the Petitioner for FIEA is a substantial change in the bargaining representative and thus raises a "question concerning representation" requiring a Board-conducted election; (2) only members of FIEA were allowed to vote; and (3) FIEA did not follow its own constitution in establishing voter elegibility standards.

This case is controlled by our recent second Supplemental Decision and Order in *Amoco Production Company*.[3] Regarding the Employer's first argument, as we said in *Amoco (Id.)*

> [a]n affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization. The organizations participating in the affiliation determine whether any administrative or organizational changes are necessary in the affiliating organization.[4]

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[4] [O]nly union members will be affected by any change in the constitution and internal union rules and regulations, as they have voluntarily agreed to do by virtue of the majority within their ranks having chosen to affiliate.

Similarly, the Employer's second argument is also lacking in merit.

> Since we view an affiliation vote as basically concerned with the organization and structure of the union and not the representational status of employees, it is the sort of internal union matter into which the Board does not ordinarily intrude. The Board determines whether the vote was conducted with adequate due process: including, for example, proper notice to all members, an orderly vote, and some rea-

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[3] 239 NLRB 1195 (1979). Member Truesdale concurring. Members Jenkins and Penello dissenting separately.

sonable precautions to maintain the secrecy of the ballot.[4]

The Employer is not contending that there was any irregularity or impropriety in PERC's administration of the election, and it is readily apparent from the facts that "[a]dequate notice, discussion and time for reflection were provided all members before the election." [5]

The Employer argues that the election was deficient because the voter eligibility requirements were not in accordance with the FIEA constitutional requirement that only members in good standing as of the last day of the month preceding the notice of election shall be allowed to vote (here December 30). But FIEA permitted members to vote who were on the last dues-checkoff list submitted by the Employer for October 1977 as well as employees joining as late as January 19.

The Petitioner contends that its actions were reasonable in the circumstances. The Pettioner alleges that the Employer put it in this dilemma by terminating dues checkoff. The Petitioner was consequently faced with the difficult, if not impossible, task of determining who, in this sizable unit spread over the State of Washington in approximately 171 locations, was a current dues-paying member. It therefore decided that anyone who joined and paid 1 month's dues before January 19 would be eligible to vote. The Petitioner also argues that its conduct was intended to, and in fact did, enfranchise unit members. Moreover, the Petitioner submits that there is no evidence that FIEA's actions were intended to undermine, or resulted in the undermining of, the electoral process.

We agree with the Petitioner. In the circumstances the broadening of the franchise does not support denial of the petition under our decision in *Amoco, supra.* We

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[4] *Id.* 3-4.

[5] *Id.*

therefore find that the Employer's arguments are without merit.

In view of the foregoing, we shall amend the certification in Cases 19-RM-816 and 19-RC-5301 to reflect the current name and affiliation of the certified Union. This amendment is not to be considered as a new certification or recertification.

ORDER

It is hereby ordered that the petition to amend the certification filed by the Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO, be, and it hereby is, granted, and that the decision and Certification of Representative in Cases 19-RM-816 and 19-RC-5301 be amended by substituting "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO" for "Firstbank Independent Employees Association."